84-212

NO._____

Office - Supreme Court, U.S
FILED
AUG 6 1984
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

INTERNATIONAL HARVESTER COMPANY,

Petitioner,

vs.

ROBERT C. WASSON, CHAIRMAN, CHARLES N. PLOWDEN AND JOHN H. LAFITTE, JR., CONSTITUTING THE MEMBERS OF THE SOUTH CAROLINA TAX COMMISSION,

Respondents.

# PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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COUNSEL OF RECORD
FOR PETITIONER

66pp

(a)

QUESTIONS TO BE PRESENTED

1. Is the seller, a Delaware Corporation exempt from the payment of the sales tax levied, assessed or payable on the gross proceeds of the sale of the 48 trucks used exclusively to transport property in interstate commerce under the provisions of the South Carolina Sales Tax Statute being §12-35-550(1) which the said State is prohibited from taxing under Article 1, §8, Cl. 3, being the Commerce Clause of the United States Constitution?

2. Is the sales tax levied against the seller and paid under protest to the buyer's state on orders for the sale of the 48 trucks used exclusively in buyer's business of transporting property in interstate commerce, as a motor common carrier, solicited in one state, accepted in another and shipped at buyer's risk, an interstate

transaction, free of said sales tax?

3. Is the seller subject to the taxing power of the State of South Carolina for the collection of the sales tax imposed on the sale of the gross proceeds of the 48 trucks consummated in the State of Indiana because of the local activities of the seller in South Carolina which were not used to channel the sale of the 48 trucks through in order to gain the advantage of a local business?

4. Has the seller, by its activities or course of dealing in the sale of the 48 trucks subjected itself to the taxing power of the State of South Carolina or has afforded the State of South Carolina jurisdiction or power to collect the sales tax from the seller?

5. Is the seller subject to the South Carolina sales tax levied and assessed against the seller on the gross proceeds

of the sales tax levied and assessed against the seller on the gross proceeds of the sale of the 48 trucks consummated in the State of Indiana and licensed, stationed and used by the buyer in the State of Georgia to transport property in interstate commerce as a common carrier when the trucks were temporarily halted in South Carolina by the buyer for inspection and to install accessorial equipment thereto in order to meet the safety rules and regulations of the Department of Transportation and the Interstate Commerce Commission?

6. Is the four-prong test adopted by this Court in Complete Auto Transit, Inc. vs Brady, 430 US 274; 97 S Ct. 1076 (1977) applied to the seller's activities in South Carolina who has been assessed the sales tax and is being forced to collect the sales tax as an out-of-state corporation

from the buyer of the gross proceeds of the sale of the 48 trucks used exclusively by buyer to transport property in interstate commerce, as a common carrier, controlling as to the determination of whether the South Carolina sales tax affecting interstate commerce is valid under the Commerce Clause?

(b)

The caption of the case in this Court contains the names of all parties.

(c) (2)

TABLE OF AUTHORITIES


| CASES: | Page |
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| Complete Auto Transit, Inc. vs Brady, 430 US 274; 97 S Ct. 1076 (1977) | (14) |
| Commonwealth Edison Co. vs Montana, 453 US 609; 101 S Ct. 2946,2953 (1981) | (15) |
| Maryland vs Lousiana, 451 US 725; 101 S Ct. 2114,2133 (1981) | (15) |
| Mobile Oil Corp. vs Commissioner of Taxes, 445 US 425,443 (198) | (15) |
| §12-35-100, 1976 SC Code of Laws | (17) |
| §12-35-110, 1976 SC Code of Laws | (19) |
| §12-35-180, 1976 SC Code of Laws | (17) |
| §12-35-550(1), 1976 SC Code of Laws | (12) |
| §12-35-550(20), 1976 SC Code of Laws | (13) |

(d)

The Decision of the South Carolina Supreme Court is hereto attached and identified as Appendix A. The Opinion of the Trial Court is hereto attached and identified as Appendix B.

(e)

Grounds on which jurisdiction is involved are:

(i) The Decision of the South Carolina Supreme Court sought to be reviewed was filed May 11, 1984.

(ii) No petition for rehearing was filed.

(iii) No cross petition for Writ of Certiorari has been filed.

(iv) The jurisdiction of this Court is envoked under 28 USC 1257(2) and a timely Notice of Appeal was filed June 4, 1984.

(f)

The Constitutional provisions which this case involves are as follows:

(i) The Commerce Clause, Article I, §8, Cl. 3 provides that:

> The congress shall have power... To regulate commerce with foreign nations and among the several states and with the Indian tribes;..."

(ii) The Due Process and Equal Protection Clauses, Amendment XIV, §1:

> "...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(g)

Concise statement of the case containing the facts material to the consideration of the questions presented.

Plaintiff, International Harvester Company (Seller) petitions this court for a Writ of Certiorari of the Decision of

the South Carolina Supreme Court filed May 11, 1984 which holds that Plaintiff is liable for a South Carolina sales tax. Plaintiff paid the sales tax under protest and entered suit against the Defendants for the refund of the sales tax, penalties and interest paid.

Seller is incorporated in the State of Delaware and maintains a Carolina Fleet Sales Branch at Charlotte, North Carolina (NC) and the trucks were assembled at its Ft. Wayne, Indiana (IN) plant.

Senn Trucking Company (Purchaser) is a South Carolina Corporation and is engaged primarily in the transportation of property as a motor common carrier under authority granted it by the Interstate Commerce Commission (ICC). These certificates authorize the transportation of named commodities from and to points and through each of the 48 contiguous states.

Seller's salesman employed by its Carolina Fleet Sales Branch at Charlotte, NC negotiated with and entered into 6 retail orders with the purchaser during the years 1977, 1978 and 1979 for the purchase of 48 trucks. Purchaser required certain specifications in the trucks purchased. Said orders are substantially the same except for the number of trucks pruchased in each order and the trucks were to be shipped by rail carrier. Seller required approval of the specifications by its Ft. Wayne, IN plant before the said orders were signed. The said orders had to be accepted by the Carolina Fleet Sales Branch at Charlotte, NC and then transmitted to Ft. Wayne, IN for the trucks to be assembled.

The orders were amended by the purchaser after they were negotiated, signed and accepted for the trucks to be shipped

by motor common carrier. The trucks were transported by motor common carrier from Ft. Wayne, IN to Greenville, South Carolina (SC) by a driver operating one of the trucks unders its own power towing a second and third truck partially mounted to the truck in front of it. The motor common carrier used the facilities of seller's Greenville, SC branch to undeck the trucks and purchaser's drivers picked up the trucks at Greenville, SC. No charges were made for the use of said undecking facilities. One of the trucks received bumper damage in transit and purchaser repaired same.

Three retail orders dated October 10, 1978 listed 20 trucks. 19 of these trucks required installation of one or more parts that had been omitted at the Ft. Wayne, IN plant.

The Greenville, SC branch installed the parts on 15 trucks and was closed July 1, 1979. The installations on the other 4 trucks were made by an independent dealer. The total cost of the work done on the 19 trucks was $4,606.28. The total cost of the 19 trucks was $771,808.50 and said cost was less than one (1%) percent of the total cost of said trucks. Seller's Carolina Fleet Sales Branch at Charlotte, NC was charged for this work.

Seller's Greenville, SC branch office had been issued a South Carolina Retailers License.

The salesman issued bills of lading when purchaser's drivers picked up the trucks showing that 45 trucks were destined to points in Georgia (GA) and 3 were destined to purchaser's Newberry, SC facility. Said bills of lading were

transmitted to seller's Carolina Fleet Sales Branch at Charlotte, NC and it issued a Manufacturers Statement of Origin which were transmitted to purchaser and purchaser purchased GA licenses and titles for the trucks.

Purchaser moved the trucks to its Newberry, SC facility where they were inspected and had the purchaser's name, ICC docket number painted thereon and for such accessorial equipment required by the ICC and the Department of Transportation (DOT) to comply with its safety regulations and use the trucks to transport property in interstate commerce. The trucks remained at Newberry, SC from 1/2 day to several days. The trucks were dispatched directly from Newberry, SC to points in Alabama, Georgia, North Carolina and Tennessee to originate their first loads to transport property in interstate commerce.

Purchaser operated a fleet of approximately 115 trucks in 1977, 165 trucks in 1978 and 250 trucks in 1979 exclusively to transport property in interstate commerce. The 48 trucks were included in the total of the trucks operated for said years.

Purchaser operated said fleet of trucks 9,121,927 miles in 1977, 11,596,030 miles in 1978 and 14,915,072 miles in 1979 transporting property in interstate commerce.

Purchaser dedicated 5 trucks and 8 trailers which were used exclusively to transport property in intrastate commerce and these trucks were not included in the 48 trucks. Purchaser's intrastate mileage was 66,154 in 1977, 89,927 in 1978 and 123,315 in 1979 which amounted to less than two percent of the gross miles operated by purchaser for said years.

The SC income tax law apportions

the income tax liability of the purchaser based on a mileage formula of the ratio of miles transporting intrastate commerce traffic in SC to the total miles operated transporting interstate traffic. Under this formula for the year 1979, the total miles operated in SC transporting interstate traffic was 19.04 percent.

The fuel taxes on fuel purchased in SC are apportioned on the basis of the use of such fuel used in other states and purchaser was reimbursed for the fuel taxes paid in those states.

Purchaser paid taxes to SC and its sub-divisions and/or agencies for 1979, in the total amount of $109,197.45 and its gross intrastate income for said period was $84,240.00. Purchaser paid SC $24,957.54 more for its share of taxes for 1979 than it received in gross income.

As of January 1, 1980, 44 states and

the District of Columbia had adopted sales and use tax laws.

Purchaser, in addition to its SC principal facility at Newberry, SC, had 3 points in Georgia, 1 in Florida, 1 in Alabama and 1 in Tennessee which include facilities and the assignment of equipment to provide interstate service for the public.

(h)(1) The federal questions were first raised by the allegations of ¶4 of the Complaint that:

(i) The sales tax cannot be collected by the buyer's state on orders solicited in SC, accepted in NC, assembled in IN and shipped at purchaser's risk to SC as an interstate transaction. Norton Co. vs Illinois, 340 US 534; 71 S Ct. 377 (1951), McLeod vs J. E. Dilworth, 322 US 327; 64 S Ct. 1023 (1944)

(ii) The sale of the 48 trucks were

not channeled through seller's local outlet to gain the advantage of a local business. Cooney vs. Mt. States Tele & Tele Co., 294 US 384; 55 S Ct 477 (1935)

(iii) The Commerce Clause delegates power to the federal government of the commerce carried on in more than one state; the 48 trucks were used exclusively by purchaser to transport property in interstate commerce from, to and between points in the United States under authority granted and regulations of the Department of DOT and the ICC. The Court has jurisdiction to preserve the interstate commerce use of these trucks from taxes levied on the gross proceeds of the sale thereof when the tax is unapportioned. Central Greyhound Lines, Inc. vs. Mealey, 334 US 653; 68 S Ct. (1948); Joseph vs Carter and Weeks

Stevedoring Co., 330 US 422; 67 S Ct. 815 (1947); Union Tank Lines vs. Wright, 249 US 275; 39 S Ct 276 (1919)

(iv) Section 12-35-550(1) of the S C Sales and Use tax exempts the gross proceeds of the sale of the 48 trucks which the State is prohibited from taxing under the Constitution of the United States of America and the assessment of said taxes against the gross proceeds of the sale of the 48 trucks is repugnant to the Commerce Clause and violates the United States Constitution as an undue interference by SC with interstate commerce and applies in full force to an unapportioned tax which permits the risk of multiple taxation on the gross proceeds of the sale of said trucks by each of the 44 states and the District of Columbia in which purchaser uses said

trucks to transport interstate commerce. Joseph vs Carter and Weeks Stevedoring, Supra

(v) The failure to apply the exemption provided for in §12-35-550(1) 1976 SC Code to the gross proceeds of the sale of the 48 trucks discriminates in favor of the exemption provided in §12-35-550(20), 1976 SC Code which specifically exempts the gross proceeds of the sale of rail cars,locomotives and parts thereof operated by railroads transporting property in interstate commerce and intrastate commerce, local activities in SC in competition with said 48 trucks of purchaser.

(vi) Seller has not, by its activities or course of dealing, subjected itself to the taxing power of SC nor has it afforded SC jurisdiction to create seller's liability to collect

the sales tax when the 48 trucks are not used, consumed or stored in SC which is simply confiscation and a denial of due process of law. Miller Brothers vs Maryland, 347 US 340; 74 S Ct 535 (1954); McLeod vs J. E. Dilworth, Supra

(vii) The four-part test criteria adopted in Complete Auto Transit, Inc. vs Brady, 430 US 274; 97 S Ct 1076 (1977) as controlling the determination whether a state tax affects interstate commerce is valid under the Commerce Clause; that the tax must be applied to an activity that has a substantial nexus with the state; the tax must be fairly apportioned to the activity carried on by the taxpayer in the state; the tax must not discriminate against interstate commerce, and the tax must be fairly related to services provided by the state. This Court has characterized said test as a

"consistent and rational method of inquiry" that looks to "the practical effect of a challenged tax" on interstate commerce. Commonwealth Edison Co. vs Montana, 453 US 609; 101 S Ct 2946,2953 (1981); Maryland Vs Louisiana, 451 US 725; 101 S Ct 2114,2133 (1981); Mobile Oil Corp. vs Commissioner of Taxes, 445 US 425,443 (1980) This Court in Maryland vs Louisiana, Supra held: (1) The taxable "use" of the flow of gas from wells in the Gulf of Mexico through processing plants in Louisiana and through interstate pipe lines to over 30 states did not break the flow of commerce and are not wholly local events; (2) The Louisiana first use tax discriminates against interstate commerce in favor of local interest as the necessary result of various tax credits and exclusions for those who owned the gas and engaged

in Louisiana products which may be cheaper than locally produced gas which is not burdened with the first use tax.

The S C sales and use tax, by its terms or operations imposing greater burden on the use of the 48 trucks transporting interstate commerce from, to and between points in SC than on the gross sales price on the rail cars, locomotives and parts thereof used by competing railroads to transport interstate property from, to and between points in SC, provides a direct commercial advantage to the local business of the railroads.

Purchaser, in 1979, paid taxes of $24,957.54 more to SC to meet its burden of services provided by SC than its gross revenue of $84,240.00 received for transporting intrastate commerce in SC with 5 trucks and 8 trailers used

exclusively for such service.

(viii) A review of the South Carolina Supreme Court's Decision, page 23,24, Appendix A, in disposing of the exceptions, finds that the "local activities upon which the sales tax is levied on the sale of the trucks. A "sale" is defined by §12-35-100, 1976 SC Code as any transfer of tangible personal property, i.e. delivery. Since delivery took place in SC, the local activity is subject to the tax and there is no violation of interstate commerce.

Section 12-35-100 and §12-35-180 of the 1976 SC Code are found in Article 1, Chapter 35 of the SC Retail License Sales and Use Tax Statute.

Section 12-35-180, 1976 SC Code provides "the provisions of this Article shall not affect the exemptions specifically provided for in Articles 5 and 7 of this

Chapter."

The South Carolina Supreme Court erred in applying §12-35-100, 1976 SC Code to find that the delivery of the trucks was made in SC, that such local activity is subject to the tax and there is no violation of interstate commerce. Said Court also finds that "the local activity subject to tax, interstate commerce is not violated so long as there is no discrimination against interstate commerce, that is, local businesses are not favored" ..." and the activity tested does not lend to repeated taxes in other states.." Since delivery can only occur in one state, here SC, there is no multiple taxation. Said decision admits that seller argued the four-part test adopted in Complete Auto Transit, Inc. vs. Brady Supra and applied with approval in Maryland vs Lousiana, Supra finding

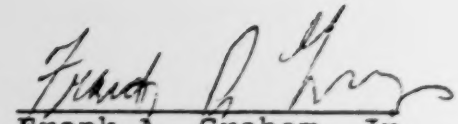
that "the fallacy of applying this argument to the sales tax in question here is that such argument is dependant upon facts that the sales tax is a tax on interstate commerce." The Court also assumes for the sake of argument that if the four-prong test is applicable, the sales tax satisfies each of the test findings that the sales tax is imposed upon the privilege of "engaging or continuing within this state by business of selling at retail. §12-35-110 of Article 1, and seller's activity of making sales in SC has a substantial nexus with this state; the sales tax is fairly apportioned, aimed at preventing multiple taxation because the evidence presented shows that no other state imposes a sales tax and the actual sale took place by delivery in SC; there is no discrimination because the sales

tax does not favor sales by local sellers but treats all sellers equally and seller's activity in SC may properly be made to bear a just share of state tax burden."

The SC Statute imposes the sales tax on the gross proceeds of the sale of the trucks and under §12-35-550(1), 1976 SC Code, prohibits SC from taxing under the Constitution or laws of the United States.

The foregoing facts which are submitted to be relevent to the issues are found in the testimony which appears in the record on Appeal to the South Carolina Supreme Court beginning at page 9, Volume 1 and extending to page 240, Volume 1 and exhibits attached.

All of which is respectfully submitted.



Frank A. Graham, Jr.
P O Box 11864
Columbia SC 29211

Dated: August 3, 1984

Due Date: August 11, 1984

APPENDIX A

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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International Harvester Company....

Appellant,

v.

Robert C. Wasson, Chairman and Charles N. Plowden and John H. LaFitte, Jr., constituting the Members of the South Carolina Tax Commission,..Respondents.

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Appeal From Richland County
John Grimball, Presiding Judge

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Opinion No. 22101
Heard February 21, 1984
Filed May 11, 1984

AFFIRMED

Frank A. Graham, Jr. of Columbia for Appellant.

Attorney General T. Travis Medlock, Retired Attorney General Daniel R. McLeod, Deputy Attorney General Joe L. Allen, Jr. and Staff Attorney Ray N. Stevens all of Columbia, for respondents.

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Appendix A-2

LEWIS, C.J.: This appeal involves the constitutional validity, under the interstate commerce clause and equal protection requirements of the Federal Constitution, of this State's assessment of a sales tax upon the sale of forty-eighty (48) truck-tractors by plaintiff International Harvester Company, a Delaware Corporation, to Senn Trucking Company, a South Carolina Corporation. Plaintiff contends that (1) the imposition of the sales tax upon the present transaction places an impermissible burden on interstate commerce, and (2) deprives it of equal protection of the laws since Section 12-35-550(2), South Carolina Code, 1976, specifically exempts the sales of railroad cars, locomotives and parts thereof from the tax but does not

exempt the sale of motor vehicles.

The trial judge held that the assessment of the tax in this case was not a burden on interstate commerce and did not deprive plaintiff of its right to equal protection. We agree. Our recent decision in Senn Trucking Company v. Wasson, 22032, filed January 19, 1984 requires affirmance of the equal protection issue. That opinion so clearly disposes of this question as to require no further comment here.

The following from the order of the Trial Judge disposes of the interstate commerce issue:

The plaintiff, International Harvester Company, is incorporated under the laws of Delaware but maintains it principal place of business in the State of Illinois. The plaintiff's business includes

the production of trucks at its Fort Wayne, Indiana, facility. The plaintiff sells its trucks both on a wholesale and retail basis. Part of its selling operations is carried on by branches such as its regional facility in Charlotte, North Carolina, known as Carolina Fleet Sales. The sales activity of the Charlotte branch includes solicitation of business in South Carolina by means of a sales representative having his residence in Mauldin, South Carolina.

The plaintiff also has local retail outlets where it sells trucks and performs repair and service work. In South Carolina during the audit period, there were retail outlets located in Greenville and Charleston and the plaintiff holds retail licenses issued by South Carolina.

Appendix A-5

Senn Trucking Company is a South Carolina Corporation engaged in business as a common carrier. Between August 20, 1977 and July 6, 1979, the plaintiff sold forty-eight (48) motor trucks to Senn. The Bill of Lading for each truck shows that the plaintiff delivered the trucks to Senn in Greenville, South Carolina. Delivery was made at International Harvester's place of business in Greenville where several of the trucks were serviced and finally delivered to Senn. Senn then transported the trucks to its terminal at Silverstreet, South Carolina.

Section 12-35-510, South Carolina Code of Laws, 1976, as amended, imposes the sales tax "upon every person engaged or continuing within this State in the business of selling at retail any tangible

personal property . . ." Thus to be subject to the tax, the plaintiff must be in business of making retail sales in South Carolina. Section 12-35-20 defines business as "all activities engaged in . . . with the object of gain . . ." There is little question that plaintiff is in business in South Carolina for a profit since it maintains outlets in Greenville and Charleston as well as soliciting business in this State by a resident salesman from Carolina Fleet Sales of Charlotte, North Carolina.

The second criteria for the sales tax is that the sales be retail sales. Section 12-35-110 says that retail sales are any sales except those defined as wholesale sales. Section 12-35-170 says a wholesale sale does not

include a sale to be a user or consumer. Since Senn Trucking Company is the user and consumer of the trucks, the sale to it is not a wholesale sale and this is a retail sale.

The final criteria for being a taxable sale is that the sale must be a sale within South Carolina. Section 12-35-100 defines a sale as any transfer of tangible personal property for a consideration. Thus, if the transfer of the trucks, i.e., delivery, took place in South Carolina, the sale would take place in this State. The trucks were manufactured in Indiana and delivered to the purchaser in Greenville, South Carolina, by a common carrier hired and paid by the plaintiff. Further, the Bill of Lading for each truck shows that delivery was made to the purchaser in

Greenville, South Carolina. Finally, the President of Senn Trucking, the purchaser, signed an affidavit to the effect that the trucks were delivered in South Carolina. Based on the foregoing factual support, it is concluded that the sales took place in South Carolina.

Since it is established that the plaintiff is in business in South Carolina that the sale of trucks to Senn Trucking were retail sales and the retail sales were made in South Carolina, it follows that the plaintiff is subject to South Carolina's sales tax unless an exemption applies. The plaintiff argues that there is an exemption provided under Section 12-35-550(1) which exempts the gross proceeds of the sale of tangible personal property which

the State is prohibited from taxing under the United States Constitution. The plaintiff argues that Article 1, Section 8 of the United States Constitution, commonly known as the Commerce Clause, prohibits the taxing of the sales here in question.

Article 1, Section 8, which gives Congress the power to regulate commerce, is not violated in the instant case. The rule is that a state may tax local activity even if such is related to interstate commerce so long as the local activity is sufficiently separate from the out-of-state aspects. Memphis Natural Gas Co. v. Stone, 335 US 80,92 L Ed 1832, 68 S Ct 1475. In the instant case, the local activities upon which a tax is levied are the sales of the trucks. Sale is defined by Section 12-35-100 as any

transfer of tangible personal property, i.e., delivery. Since delivery took place in South Carolina, the local activity is subject to the tax and there is no violation of interstate commerce.

Given a local activity subject to tax, interstate commerce is not violated so long as there is no discrimination against interstate commerce, i.e., local businesses are not favored (see General Motors Corp. v. Washington, 377 US 436, 12 L Ed 2d 430, 84 S Ct 1564, and the activity taxed does not lend itself to repeated taxes in other states (see Memphis Natural Gas, supra.). In the instant case, there is no discrimination since all sales are subject to tax whether made by local businesses or made by businesses outside the state so long as delivery is within South Carolina. Thus, there is no dis-

crimination since both local and foreign businesses are treated alike. Likewise there is no danger of multiple taxation by several states since the sales tax is levied upon the sale evidence by delivery in South Carolina. Since delivery can only occur in one state, here South Carolina, there is no multiple taxation.

Finally, as to interstate commerce, International Harvester argues that under Maryland v. Louisiana, 451 US 725, 68 L Ed 576, 101 S Ct 2114, the tax must have a substantial nexus with the state, be fairly apportioned, not discriminate against interstate commerce and be fairly related to services provided by the State. The fallacy of applying this argument to the sales tax in question here is that such an argument is dependent upon finding the sales tax is a tax on interstate

commerce. In the instant case, there is no tax on interstate commerce at all but rather a tax on an intrastate activity, i.e., a sale within South Carolina.

Assuming for sake of argument that the four-prong test stated above is applicable, the sales tax in the instant case satisfies each of the tests. The sales tax is imposed upon the privilege of "engaging or continuing within this State in the business of selling at retail." International Harvester has a retail sales license for South Carolina and operates facilities in Greenville and Charleston as well as soliciting for business in South Carolina by a resident sales agent. Such facts show that International Harvester's activity of making sales in South Carolina has a substantial nexus with this State and thus the first test

is satisfied.

The tax in question also satisfies the second test of being fairly apportioned. This test is aimed at preventing multiple taxation. There is no evidence presented that any other state imposed a sales tax on the sale of the trucks involved in this litigation. In fact, undisputed testimony was given that no other state had imposed any sales tax and thus there is no risk of multiple taxation. The tax in question is fairly apportioned since the actual sale by means of delivery took place in South Carolina and since delivery can only take place in South Carolina, no other state can impose a sales tax.

The third test of discrimination against interstate commerce is also satisfied. The sales tax of four percent is imposed

on all transactions without regard to whether the seller is local or outside of the state. Likewise, the four percent tax applies to all sales made within this State without regard to the intended use either within or without South Carolina. Unlike the use tax situation in Maryland v. Louisiana, supra, where in-state users were given credits against the use tax and this derived an advantage over other users, the instant sales tax does not favor sales by local sellers but rather treats all sellers equally.

Finally the tax is fairly related to the services provided by South Carolina. The fourth test requires that the measure of the tax is to be reasonably related to the extent of the contracts of Inter-National Harvester since its activity

in South Carolina may properly be made to bear "a just share of state tax burden". Western Live Stock v. Bureau of Revenue, 303 US at 250, 82 L Ed 823, 580 S Ct 546. In the instant case, the operating incidence of the tax is on the privilege of selling goods at retail and the tax is measured by the gross procceds of the sales. Because the tax is measured as a percentage (4%) of the gross proceeds of sales, the tax is in "proper proportion" to International Harvester's sales activity within South Carolina and, therefore, to their "consequent enjoyment of the opportunities and protections which the state has afforded" in connection with those activities. See General Motors Corp. v. Washington, supra, at 441. When a tax is assessed in proportion to a taxpayer's activities or presence in

a state, the taxpayer is shouldering its fair share of supporting the state's provision of "police and fire protection, the benefit of a trained work force and the advantages of a civilized society". Exxon Corp. v. Wisconsin Dept. of Revenue, 447 US 207, 65 L Ed 2d 66, 100 S Ct 2109. Thus the tax is farily related to services provided by South Carolina.

Judgment affirmed.

LITTLEJOHN, NESS, GREGORY and HARWELL, JJ., concur.

Appendix B

| | | |
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| STATE OF SOUTH CAROLINA | ) | IN THE COURT |
| | ) | OF COMMON PLEAS |
| COUNTY OF RICHLAND | ) | 81-CP-40-2122 |

| | | |
|---|---|---|
| International Harvester Company, | ) | |
| Plaintiff, | ) | |
| vs | ) | |
| | ) | ORDER |
| Robert C. Wasson, Chairman and Charles N. Plowden and John H. LaFitte, Jr., Constituting the Members of the South Carolina Tax Commission, | ) | |
| Defendants. | ) | |

This action involves a suit for a refund of sales taxes paid under protest with this Court having jurisdiction to decide the question by means of authority given under §12-35-1440. The plaintiff sold forty-eight (48) truck-tractors to Senn Trucking Company but did not collect a sales tax. The South Carolina Tax Commission determined that a sales tax

was due and assessed the tax. The plaintiff argues that the sales tax assessment is improper since it is a violation of interstate commerce and a violation of equal protection of the law. Each of these issues will be addressed in turn.

FACTS

The plaintiff, International Harvester Company. is incorporated under the laws of Delaware but maintains its principal place of business in the State of Illinois. The plaintiff's business includes the production of trucks at its Fort Wayne, Indiana, facility. The plaintiff sells its trucks both on a wholesale and retail basis. Part of its selling operations is carried on by branches such as its regional facility in Charlotte, North Carolina, known as Carolina Fleet Sales. The sales activity of the

Charlotte branch includes solicitation of business in South Carolina by means of a sales representative having his resident in Mauldin, South Carolina.

The plaintiff also has local retail outlets where it sells trucks and performs repair and service work. In South Carolina during the audit period, there were retail outlets located in Greenville and Charleston and the plaintiff holds retail licenses issued by South Carolina.

Senn Trucking Company is a corporation incorporated in South Carolina and in the business of being a common carrier. Between August 20, 1977 and July 6, 1979, the plaintiff sold forty-eight (48) motor trucks to Senn. The Bill of Lading for each truck shows that the plaintiff delivered the trucks to Senn in Greenville, South Carolina.

Delivery was made at International Harvester's place of business in Greenville where several of the trucks were serviced and finally delivered to SEnn. Senn then transported the trucks to its terminal at Silverstreet, South Carolina.

INTERSTATE COMMERCE

Section 12-35-510, South Carolina Code of Laws, 1976, as amended, imposes the sales tax "upon every person engaged or continuing within this State in the business of selling at retail any tangible personal property***". Thus to be subject to the tax, the plaintiff must be in the business of making retail sales in South Carolina. Section 12-35-20 defines business as "all activities engaged in***with the object of gain***". There is little question that plaintiff

is in business in South Carolina for a profit since it maintains outlets in Greenville and Charleston as well as soliciting business in this State by a resident salesman from Carolina Fleet Sales of Charlotte, North Carolina.

The second criteria for the sales tax is that the sales be retail sales. Section 12-35-110 says that retail sales are any sales except those defined as wholesale sales. Section 12-35-170 says a wholesale sale does not include a sale to a user or consumer. Since Senn Trucking Company is the user and consumer of the trucks, the sale to it is not a wholesale sale and thus is a retail sale.

The final criteria for being a taxable sale is that the sale must be a sale within South Carolina. Section 12-35-100

defines a sale as any transfer of tangible personal property for a consideration. Thus, if the transfer of the trucks, i.e., delivery, took place in South Carolina, the sale would take place in this State. The trucks were manufactured in Indiana and delivered to the purchaser in Greenville, South Carolina, by a common carrier hired and paid by the plaintiff. Further, the Bill of Lading for each truck shows that delivery was made to the purchaser in Greenville, South Carolina. Finally, the President of Senn Trucking, the purchaser, signed an affidavit to the effect that the trucks were delivered in South Carolina. Based on the foregoing factual support, it is established that the sales took place in South Carolina.

Having established that the plaintiff

is in business in South Carolina, that the sales of trucks to Senn Trucking were retail sales and that the retail sales were made in South Carolina, the conclusion is that the plaintiff is subject to South Carolina's sales tax unless an exemption applies. The plaintiff argues that there is an exemption provided under §12-35-550(1) which exempts the gross proceeds of the sale of tangible personal property which the State is prohibited from taxing under the United States Constitution. The plaintiff argues that Article 1, Section 8 of the United States Constitution, commonly known as the Commerce Clause, prohibits the taxing of the sales here in question.

Article 1, Section 8, which gives Congress the power to regulate commerce, is not violated in the instant case. The

rule is that a state may tax a local activity even if such is related to interstate commerce so long as the local activity is sufficiently separate from the out-of-state aspects. Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1948). In the instant case, the local activities upon which a tax is levied are the sales of the trucks. Sale is defined by §12-35-100 as any transfer of tangible personal property, i.e., delivery. Since delivery took place in South Carolina, the local activity is subject to the tax and there is no violation of interstate commerce.

Having found a local activity subject to the tax, interstate commerce is not violated so long as there is no discrimination against interstate commerce, i.e., local businesses are not favored (General Motors Corp. v. Washington,

377 U.S. 436 (1964), and the activity taxed does not lend itself to repeated taxes in other states (see Memphis Natural Gas, supra). In the instant case, there is no discrimination since all sales are subject to tax whether made by local businesses or made by businesses outside the state so long as delivery is within South Carolina. Thus, there is no discrimination since both local and foreign businesses are treated alike. Likewise there is no danger of multiple taxation by several states since the sales tax is levied upon the sale evidenced by delivery in South Carolina. Since delivery can only occur in one state, here South Carolina, there is no multiple taxation.

The Tax Commission has a Regulation governing the taxation of sales related

to interstate commerce. Regulation 117-170 states in part as follows:

> "***. However, where tangible personal property pursuant to a sale is delivered in this State to the buyer***the retail sales tax applies notwithstanding that the buyer may subsequently transport the property out of the state."

Here the trucks were delivered to Senn at Greenville, South Carolina, and it is of no consequence that such trucks are later used in other states. This Regulation has been in effect since 1951. Where the construction or administrative interpretation of a statute has been applied for a number of years and has not been changed by the Legislature, there is created a strong presumption that such interpretation or construction is correct. Ryder Truck Lines, Inc. v. South Carolina Tax Commission, 248 S.C. 148, 149 S.E.2d

435; Etiwan Fertilizer Company v. South Carolina Tax Commission, 217 S.C. 354, 60 S.E.2d 682. Additionally, the construction of a statute by the agency charged with executing it is entitled to the most respectful consideration and should not be overruled without cogent reasons. Faile v. South Carolina Employment Security Commission, 267 S.C. 536, 230 S.E.2d 219 (1976); Stephenson Finance Company v. South Carolina Tax Commission, 267 S.C. 536, 230 S.E.2d 219 (1976); Stephenson Finance Company v. South Carolina Tax Commission, 242 S.C. 98, 130 S.E.2d 72. There are no cogent reasons to overrule the Regulation at issue in this case.

Finally, as to interstate commerce, International Harvester argues that under Maryland v. Louisiana, ___US___,

101 S.Ct. 2114, the tax must have a substantial nexus with the state, be fairly apportioned, not discriminate against interstate commerce and be fairly related to services provided by the state. The fallacy of applying this argument to the sales tax in question here is that such an argument is dependent upon finding the sales tax as being a tax on interstate commerce. In the instant case, there is no tax on interstate commerce at all but rather a tax on an intrastate activity, i.e., a sale within South Carolina.

Assuming for sake of argument that the four-prong test stated above is applicable, the sales tax in the instant case satisfies each of the tests. The sales tax is imposed upon the privilege of "engaging or continuing within

this State in the business of selling at retail". International Harvester has a retail sales license for South Carolina and operates facilities in Greenville and Charleston as well as soliciting for business in South Carolina by a resident sales agent. Such facts show that International Harvester's activity of making sales in South Carolina has a substantial nexus with this State and thus the first test is satisfied.

The tax in question also satisfies the second test of being fairly apportioned. This test is aimed at preventing multiple taxation. There is no evidence presented that any other state imposed a sales tax on the sale of the trucks involved in this litigation. In fact, undisputed testimony was given that no other state had imposed any sales tax and thus there

is no risk of multiple taxation. The tax in question is fairly apportioned since the actual sale by means of delivery took place in South Carolina and since delivery can only take place in South Carolina, no other state can impose a sales tax.

The third test of discrimination against interstate commerce is also satisfied since there is no discrimination. The sales tax of four percent is imposed on all transactions without regard to whether the seller is local or outside the state. Likewise, the four percent tax applies to all sales made within this State without regard to the intended use either within or without South Carolina. Unlike the use tax situation in Maryland v. Louisiana, supra, where in-state users were given

credits against the use tax and thus derived an advantage over other users, the instant sales tax does not favor sales by local sellers but rather treats all sellers equally.

The fourth test of the tax being fairly related to the services provided by South Carolina is also satisfied. This fourth test requires that the measure of the tax is to be reasonably related to the extent of the contacts of International Harvester since its activity in South Carolina may properly be made to bear "a just share of state tax burden". Western Live Stock Bureau v. Bureau of Revenue, 303 U.S. at 254. In the instant case, the operating incidence of the tax is on the privilege of selling goods at retail and the tax is measured by the gross proceeds of the sales.

Because the tax is measured as a percentage (4%) of the gross proceeds of sales, the tax is in "proper proportion" to International Harvester's sales activity within South Carolina and, therefore, to their "consequent enjoyment of the opportunities and protections which the state has afforded" in connection with those activities. See General Motors Corp. v. Washington, supra at 441. When a tax is assessed in proportion to a taxpayer's activities or presence is a state, the taxpayer is shouldering its fair share of supporting the state's provision of "police and fire protection, the benefit of a trained work force and the advantages of a civilized society." Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. at 228. Thus the tax is fairly related to services provided by South

Carolina.

EQUAL PROTECTION

The law concerning the rights to equal protection in sales tax exemptions is states in State v. Byrnes, 219 S.C. 485, 66 S.E. 2d 33..

> "To invalidate a tax statute for discrimination, in the absence of specific constitutional inhibition, exemption from its terms must be purely arbitrary, which cannot be fairly said of the exemptions contained in the Act before us. It was said in Marshall v. Tax Comm., supra, (178 S.C. at page 62, 182 S.E. at page 98) upon the authority of numerous cited decisions of the U. S. Supreme Court: 'The plaintiff must be able to satisfy the court that the classification (of income for State taxation) has its origin in nothing better than whim and fantasy and tyrannical exercise of arbitrary powers, before the tax in question will be stricken down.'".

The State has latitude in setting its tax structure. The United States Supreme Court in Steward Machine Co. v. Davis, 301 U.S. 548, said the following:

> "[States] are not confined to a formula of rigid uniformity in framing measures of taxation. They may tax some kinds of property at one rate, and others at another, and exempt others altogehter. They may lay an excise on the operations of a particular kind of business, and exempt some other kind of business clearly akin thereto." (at p. 584)

There is no evidence which shows that the classification is based on nothing but "fantasy and tyrannical exercise of arbitrary power:. The classifications of the General Assembly can be overturned only by plaintiff carrying his burden of proof that the classification is arbitrary. Gregg Dyeing Co. v. Query, 166 S.C. 177, 164 S.E. 568, affirmed 286 U.S.

472, 52 S.Ct. 631.

A rational basis is found for placing railroads and trucking lines in different classes since there are inherent difference between the two. Railroads are limited by having access to only rails whereas trucks have free access to highways. Railroads require a much greater capital investment than truck lines since railroads must create and pay for their rail tracks. Since railroads are required to make greater capital outlays, the exemption would serve to reduce the burden upon railroads and the exemption would thus encourage use and expansion of railroads in South Carolina.

The encouragement of industry such as railroads is a valid purpose for the exemption. In a closely related

question, Kentucky found as follows in Department of Revenue v. Spalding Laundry and Dry Cleaning Co., 436 S. W. 2d 522:

> "Our question is whether the exemption of machinery used in manufacturing is arbitrary and unreasonable because it does not equally exempt similar machinery used in a service industry or plant.*** That such tax exemption statutes are valid is not questioned. See Am. Jur., Taxation, section 591 (page 576); Todd County v. Bond Bros., 300 Ky. 224, 188 S.W. 2d 325. As pointed out in that case, the objective was to increase the resources of the state and its taxable property 'through the establishment of new industries'.
>
> ***
>
> It is entirely reasonable for such a body to conclude that the development of manufacturing plants would have a greater beneficial impact on the state economy than the development of other industries.
>
> This is a policy matter

> as we have said, is peculiarly one for legislative determination. The wisdom of the policy is a matter not before us. There are sound reasons which justify placing in the tax exempt category only that machinery for new and expanded industry which is used in the manufacturing process."

Thus, in the instant case the General Assembly is free to exercise its judgment since there is a rational difference between railroads and trucks and allowing an exemption to railroads furthers an object of the State to encourage railroad expansion. Further support for this position is found in Niagara Junction Rail Co. v. Creagh, 154 N.Y.S.2d 229, affirmed 144 N.E. 2d 720, where a New York court held there was no violation of equal protection where "commercial vessels" were exempt but

land carriers such as railroads were not. The court found the classification reasonable.

## CONCLUSION

For the reasons discussed above, there is not a violation of interstate commerce or of the plaintiff's rights to equal protection.

Thus, the sales tax assessment by the Tax Commission is proper.

AND IT IS SO ORDERED.

/s/
JOHN GRIMBALL
Judge, Fifth Judicial Court

Columbia, South Carolina

September 24, 1982

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of August, 1984, three copies of the Petition for For Writ of Certiorari were mailed, by depositing same in the United States Post Office at Columbia, South Carolina, by certified mail, with postage prepaid, on Ray N. Stevens, Counsel of Record for Respondents, Attorney General's Office, Calhoun State Building, Columbia, South Carolina

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